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# In the Supreme Court

OF THE

United States

OCTOBER TERM, 1940

No. 503

GUS FARBER,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

PETITION FOR WRIT OF CERTIORARI

and

BRIEF IN SUPPORT THEREOF.

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## PETITION FOR WRIT OF CERTIORARI.

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*May it please the Court:*

The Petition of Gus Farber respectfully shows to this Honorable Court:

A.

### **SUMMARY STATEMENT OF THE MATTER INVOLVED.**

Two questions are presented by this petition.

The first is, whether a United States Treasury Regulation, governing public conduct on the subject of gold coin operated, by reason of an inconsistency, to repeal an earlier issued regulation.

(For clarity, we shall hereinafter refer to the regulation first promulgated as the First Regulation, and to the regulation thereafter promulgated as the Second Regulation.)

The two regulations conflict with one another in that:

(a) That the doing of one class of acts wilfully or otherwise appears to be wholly legal under the Second Regulation, while under the First Regulation the doing wilfully of any one of said acts constitutes a felony, and

(b) That the doing wilfully or otherwise of an act of another definite kind merely subjects the doer under the Second Regulation to a civil penalty, while, under the First Regulation said act if wilfully done subjects the doer to criminal prosecution for the commission of a felony.

The First Regulation (App. 29) was issued by the President (Executive Order No. 6260, as amended) under the authority of the "Trading With the Enemy Act of 1917" (40 Stat. L. 411), as amended March 9, 1933, 48 Stat. L. 1, 12 U.S.C.A. 95A (App. 12), which Act we shall hereinafter refer to as the First Act.

The Second Regulation, Sec. 20 of the Provisional Regulations, issued on the effective date of and under the Gold Reserve Act of 1934 (App. 33) was issued by the Secretary of the Treasury pursuant to the mandate of Congress, contained in Section 3 of the Gold Reserve Act of 1934, 48 Stat. L. 337 (App. 35),

which Act shall hereinafter be referred to as the Second Act.

Each of said statutes purports to authorize the making of regulations upon the subject of gold coins.

The First Regulation provides in substance that one who acquires gold coins, without a license, has violated the statute unless (a) he is a collector of rare and unusual coins, (b) he has acquired the coins from another such collector, (c) the coins acquired have a recognized special value to collectors of rare and unusual coins. This regulation restates the penalty included in the First Act, of fine not exceeding \$10,000.00 or imprisonment for not to exceed ten years.

The Second Regulation contains no provision requiring that persons dealing in rare and unusual gold coins, without a license, need be collectors of such. The essential requirements being that each coin must possess actual numismatic value.

Petitioner respectfully contends that the decision of the Circuit Court attempts to legislate into the Second Regulation a non-existent proviso to the effect that a license is required if the acquiring be done wilfully and did thereby attempt to avoid an anomalous situation, a situation where two regulations thus in conflict and which thus on the same set of facts permits a choice between severe punishment and mild forfeiture or between severe punishment and no punishment or forfeiture at the mere wish and untrammelled will of a non-judicial field officer of the United States government.

A second question is also presented as to whether the statute upon which the First Regulation was based is unconstitutional on the ground that it grants to the President the power to legislate and is thereby contrary to the provisions of Article I, Paragraph 1, of the Constitution of the United States.

Petitioner was indicted in the Northern District of California. The first count of the indictment (R. 1) charged that on February 21, 1939, petitioner wilfully and unlawfully acquired thirteen \$20 gold coins of the United States without a license therefor. He was convicted upon the first count of the indictment (R. 7). Petitioner when first questioned about the gold coins in question readily admitted that he bought and sold them (R. 79 and 70) and at the trial he testified that the transaction was entered by him upon his books of account (R. 98). He contended at the trial (R. 198-199) and upon his appeal (R. 174 and 198) that even though he admittedly was not a collector of rare and unusual coins he nevertheless had a legal right to do the alleged acquiring without first obtaining a license therefor and that this right was given to him by the permissive features of the Second Regulation.

The trial Court overruled petitioner's demurrer (R. 5), denied his motion in arrest of judgment (R. 167-168) and his motion for a directed verdict (R. 137). The judgment of conviction was entered on September 23, 1939 (R. 7). Petitioner appealed the judgment to the United States Circuit Court of Appeals for the Ninth Circuit, which Court on July 27,

1940 affirmed the judgment of the trial Court (R. 223). Petitioner thereafter, on August 21, 1940, filed a petition for rehearing in said Court which petition was denied September 16, 1940 (R. 224).

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B.

**REASONS RELIED ON FOR ISSUANCE OF THE WRIT.**

1. The decision of the United States Circuit Court of Appeals for the Ninth Circuit in refusing to be bound by or to follow the decision of the United States Supreme Court in the case of *Yuginovich v. U. S.*, 256 U.S. 450, 65 L. Ed. 1043, with reference to the rule to be applied in construing penal statutes, is in conflict with the applicable decisions of the United States Supreme Court.

2. The decision of the United States Circuit Court of Appeals for the Ninth Circuit in holding that the First Regulation is valid and in full force in effect decided two important questions of federal law which have not been, but should be, settled by the United States Supreme Court.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court for the Ninth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its

docket, "No. 9305, *Gus Farber*, Appellant vs. *United States of America*, Appellee," and that the said judgment of the said Circuit Court may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

Dated, San Francisco, California,  
October 11, 1940.

GUS FARBER,

By CHELLIS M. CARPENTER,

*Attorney for Petitioner.*



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**BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.**

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I.

**OPINION OF THE COURT BELOW.**

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit was rendered July 27, 1940, and is reported in ..... Federal (2d) ....., and is set forth in full in the record (R. 210).

## II.

### **JURISDICTION.**

1. The jurisdiction of the Supreme Court of the United States to issue the writ of certiorari herein prayed for is invoked under Judicial Code Section 240 (a), as amended by the Act of February 13, 1925, 43 Stat. L. 938 (28 U.S.C. 347 (a)).

2. The judgment which is sought to be reviewed was entered by the United States Circuit Court of Appeals, for the Ninth Circuit, on July 27, 1940 (R. 223). A petition by petitioner for a rehearing (within the time allowed by the rules of said Circuit Court) was denied on September 16, 1940 (R. 224).

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## III.

### **STATEMENT OF THE CASE.**

A full statement of the case has been given under heading "A" in the petition and in the interest of brevity, the statement is not to be repeated at this point.

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## IV.

### **SPECIFICATION OF ERRORS.**

A. The United States Circuit Court of Appeals for the Ninth Circuit erred in holding that the trial Court properly overruled petitioner's demurrer.

B. The said Circuit Court erred in holding that the Gold Reserve Act of 1934 did not repeal the gold coin clauses of Executive Order 6260, as amended.

C. The said Circuit Court erred in deciding in effect that Section 3 of the 1934 Gold Reserve Act permits the Secretary of the Treasury to make only such regulations thereunder which do not conflict with Executive Order 6260, as amended.

D. The said Circuit Court erred in that its decision has the effect of legislating out of existence at least some of the permissive portions of Section 3 of the 1934 Gold Reserve Act and Section 20 of the Regulations issued by the Secretary of the Treasury thereunder.

E. The said Circuit Court erred in that its decision in effect holds that Section 20 of the Regulations issued by the Secretary of the Treasury under the 1934 Gold Reserve Act, in so far as it permits persons not collectors of rare coins to acquire, hold and dispose of gold coins of recognized special value to collectors of rare and unusual coins without a permit, is of no valid force and effect where the acquiring, holding or disposing is done wilfully.

F. The said Circuit Court erred in that its decision impliedly declares that the delegation of authority to the President upon the subject of gold coin under the Trading With the Enemy Act of 1917, as amended, was not an unconstitutional delegation of legislative power.

## V.

## ARGUMENT.

## SUMMARY OF THE ARGUMENT.

*Point A.* The Circuit Court of Appeals erred in holding that the first count of the indictment constituted a public offense against petitioner, for the reason that the law upon which said count of the indictment was based was repealed by the Gold Reserve Act of 1934 prior to the date alleged in the indictment.

*Point B.* The said Circuit Court of Appeals erred in holding that the first count of the indictment states a public offense, for the reason that the Act which authorized the President to prohibit under penalty of fine or imprisonment, or both, any transactions in foreign exchange, transfers of credit between or payments by banking institutions as defined by the President, and export, hoarding, melting or earmarking of gold or silver coin or bullion or currency, by any person within the United States, is an unconstitutional delegation of legislative power.

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POINT A.

THE CRIME OF ACQUIRING GOLD COIN, IF IT EVER EXISTED,  
WAS ABOLISHED BY THE GOLD RESERVE ACT OF 1934  
PRIOR TO THE TIME ALLEGED IN THE INDICTMENT.

The crime of illegally *acquiring* gold coin, if there be any, was *first created* by Presidential regulation, Executive Order 6260. The original Executive Order 6260 was issued by the President on August 28, 1933,

and is set forth, so far as pertinent, in Appendix pp. 22-23. (The amendment thereto was effected on January 20, 1934, by Executive Order 6556 (App. 29)).

Executive Order 6260, as amended, upon which said first count is based, so far as pertinent, reads as follows:

"Sec. 4. No person other than a Federal Reserve bank shall after the date of this order acquire in the United States any gold coin \* \* \* except under license therefor issued pursuant to this Executive Order, provided \* \* \* that collectors of rare and unusual coin may acquire from one another and hold without necessity of obtaining a license therefor, gold coin having a recognized special value to collectors of rare and unusual coin \* \* \*."

The only statute which ever purported to authorize the promulgation of Executive Order 6260, as amended or otherwise, was that which created the March 9, 1933 amendment to Section 5 (b) of the "Trading With the Enemy Act" of 1917, 40 Stat. L. 411 (App. 1). The amendment of March 9, 1933 was contained in an act entitled "An Act to Provide Relief in the Existing National Emergency in Banking, and for Other Purposes," 48 Stat. L. 1 (App. 12).

The said amendment amended Section 5 (b), so far as pertinent, as follows:

"(b) *During time of war or during any other period of national emergency declared by the President*, the President may, through any agency

that he may designate, or otherwise, \* \* \* regulate or prohibit, under such rules and regulations as he may prescribe by means of license or otherwise, any transactions in foreign exchange, *transfers of credit between or payments by banking institutions as defined by the President*, and export, *hoarding, melting, or earmarking of gold or silver coin or bullion or currency*, by any person within the United States or any place subject to the jurisdiction thereof; \* \* \*. *Whoever wilfully violates any of the provisions of this subdivision or of any license, order, rule or regulation issued thereunder, shall, upon conviction, be fined not more than \$10,000, or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by like fine, imprisonment, or both. As used in this subdivision the term 'person' means an individual, partnership, association or corporation.*" (Italics ours and show that which was supplied by said amendment.)

It was under the authority vested in him by the Trading With the Enemy Act as it stood prior to amendment that the President declared the "Bank Holiday" (Executive Order 2039 (App. 8)), made on March 6, 1933, just three days before the enactment of the 1933 amendment.

We shall hereinafter refer to Executive Order 6260, as amended, as the First Regulation and to the "Trading With the Enemy Act" of 1917, as amended, as the First Act.

The Gold Reserve Act of 1934, 48 Stat. L. 337 (App. 35), was enacted January 30, 1934. The first section of said Act is numbered and entitled, "Section 2." It gives the United States title to all gold in any form held by the Federal Reserve Bank and it amends by express language certain paragraphs of the Federal Reserve Act. The remaining clauses of the Gold Reserve Act of 1934 which embrace the subject of gold coin, so far as material are as follows:

"Section 3. The Secretary of the Treasury shall, by regulations issued hereunder, with the approval of the President, prescribe the conditions under which gold may be acquired and held, transported, melted, or treated, imported, exported, or earmarked; \* \* \* gold in any form may be acquired, transported, melted, or treated, imported, exported, or earmarked or held in custody for foreign or domestic account (except on behalf of the United States) only to the extent permitted by, and subject to the conditions prescribed in, or pursuant to, such regulations. \* \* \*

Section 4. Any gold withheld, acquired, transported, melted, or treated, imported, exported, or earmarked or held in custody, in violation of this Act, or of any regulations issued hereunder, or license issued pursuant thereto, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law; and in addition any person failing to comply with the provisions of this Act, or of any such regulations or licenses, shall be subject to a penalty equal to twice the value of gold in respect of which such failure occurred."

“Section 17. All acts and parts of acts inconsistent with any of the provisions of this Act are hereby repealed.” (Approved January 30, 1934.)

We shall hereinafter refer to the Gold Reserve Act of 1934 as the Second Act.

The Second Act clearly shows, first, that a violation of the Second Act is not a criminal offense; and second, that the power which had been theretofore conferred upon the President by the First Act upon the subject of gold coin was given to the Secretary of the Treasury by the Second Act. The power and jurisdiction to *make* the regulations under the Second Act were vested wholly and exclusively in the Secretary of the Treasury, the right to *initiate* such regulations having been thereby removed from the President and lodged with the Secretary of the Treasury.

A comparison of the First Act and the Second Act upon the subject of gold coin will also reveal that the language in Sections 3 and 4 of the Second Act is equally as comprehensive as the language used in the First Act. It is true that the word “hoarding” is not contained in the Second Act, but it is fully covered by the words which are employed in Sections 3 and 4 of the Second Act. The Second Act uses the words “withholding,” “hold,” “acquire,” “transport,” “mutilate” etc. These words, we believe, are of sufficient scope to cover every possible act connected with “hoarding” which word has been defined in *Merritt v. U. S.*, 264 Fed. 870, reversed upon confession of error by the Solicitor General, 255 U.S. 579, 65 L. Ed. 795. The language employed in the Second Act



is therefore all-embracing. The subject matter with reference to gold coin is therefore identical in each of the two Acts.

The set of regulations issued under the Second Act by the Secretary of the Treasury with the President's approval is entitled "Provisional Regulations issued under the Gold Reserve Act of 1934" (App. 30). The Court will take judicial notice that this set of regulations was widely distributed in pamphlet form to the general public and that no reference to the First Regulation appeared therein. The pertinent portion of said set of regulations is Section 20, which as far as material, provides as follows:

"Gold coin of recognized special value to collectors of rare and unusual coins \* \* \* may be acquired and held, transported within the United States, imported, or held in custody for domestic account without the necessity of holding a license therefor."

This regulation we shall hereinafter refer to as the Second Regulation.

It is significant that the Second Regulation does not prescribe that those dealing in rare and unusual coins without a license need be collectors. That the omission to thus prescribe was a deliberate one is obvious from the language employed in the various executive orders shown in the appendix. The first question to be decided upon this appeal is, How much, if any, of the First Regulation falls within Section 17 of the Second Act? Or, putting it another way, Is there any inconsistency between the First Regu-

lation and the Second Regulation as to the subject matter alleged in the first count of the indictment? Petitioner contends that the said Regulations are inconsistent and that therefore Section 17 of the Second Act, notwithstanding the provisions in Section 13 of said Act, did by the declaration of repeal declared therein effectively destroy the power to criminally prosecute under the facts alleged in the first count of the indictment.

Whether or not, as contended by appellant and denied by the Circuit Court, the Second Act (Sections 3 and 4), together with the Second Regulation operated to repeal the gold coin portion of the First Act and the First Regulation, it is apparent that the Second Act has permissive features in it quite beyond the scope of the First Act. Due entirely to the authorization contained in the Second Regulation it is no longer necessary for anyone acquiring or holding gold coin of recognized special value to collectors of rare and unusual coins to hold a license for its acquisition or disposal. The record, beyond any question of doubt, conclusively establishes that the gold coin involved in the instant case had a value, beyond their gold content, to collectors of rare and unusual coins. The opinion of the Circuit Court, however, in holding that the appellant is guilty of the offense charged in the indictment under the provisions of the First Act and the First Regulation simply refused to recognize the right of the appellant to acquire and dispose of such gold coins under the permissive portions of the Second Regulation. In disposing of appellant's

contention that the gold coin in question being rare and unusual coins having a special value to collectors and therefore squarely within the permissive portions of the Second Regulation, the opinion merely states in effect that the indictment was under the First Act and that with reference to these particular coins and their acquisition or disposal the Second Act and Second Regulation were not a repeal of the gold coin portion of the First Regulation.

If the opinion of the Circuit Court is correct, it simply means that the Second Regulation is of no force and effect for the following reasons:

The Second Regulation, which is totally silent upon the question of intent, permits a collector to acquire gold coin of the recognized special value from any source at his command without a license and it permits any person not a collector to acquire from a collector or other person gold coin of such recognized value. Thus, the effect of the decision of the Circuit Court is to place said persons, who *wilfully* acquire gold coin of such recognized value in the position of having violated the First Regulation and subject to criminal prosecution therefor despite the express language used in the Second Regulation. The effect of the decision therefore is to legislate into the Second Regulation a non-existent proviso. The decision by thus curbing the will of the Secretary of the Treasury legislates out of existence a part of the permissive portions of the Second Regulation as well as the authority therefor contained in the Second Act. The decision leaves the Secretary of the Treasury without

power to make any regulation inconsistent with the First Regulation. The Second Act places no limitation upon the discretion of the Secretary of the Treasury in the making of the regulations. There is nothing in the Second Regulation which excepts persons, who without a license *wilfully* acquire such gold coins. It appears therefore that if the Second Regulation contains no such exception we then have a situation where a decidedly definite inconsistency exists between the First Regulation and the Second Regulation. This inconsistency is that which is designated by Section 17 of the Second Act and the First Regulation must therefore be deemed to have been repealed.

*U. S. v. Yuginovich*, 256 U.S. 450, 65 L. Ed. 1043, cited with approval in *U. S. v. Staffof*, 260 U. S. 477, 479-480, 67 L. Ed. 358, 360-361; *U. S. v. Tynen*, 11 Wall. 88, 20 L. Ed. 153.

In the *Yuginovich* case, *supra*, the defendant was indicted for defrauding the government by not paying the tax on the distilling of spirits. The defense interposed a motion to quash on the ground that the 19th Amendment and the Volstead Law, which in general, made the manufacturing, possession, etc. of intoxicating liquors illegal, and provided a penalty therefor, repealed the former law. The first sentence of the Volstead Act, Section 35, repealed all prior acts to the extent of their inconsistency with the National Prohibition Act. A clause appearing at the end of said section provided:

“\* \* \* nor shall this act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws.”

The Supreme Court in holding that the former laws were nevertheless repealed, said in 256 U.S. 450, at page 463:

“It is, of course, settled that repeals by implication are not favored. It is equally well settled that a later statute repeals former ones when clearly inconsistent with the earlier enactments. *United States v. Tynen*, 11 Wall. 88, 20 L. Ed. 153. In construing penal statutes, it is the rule that later enactments repeal former ones covering practically the same acts, but fixing a lesser penalty. The concluding phrase of Section 35, by itself considered, is strongly indicative of an intention to retain the old laws. But this section must be interpreted in view of the Constitutional provisions contained in the 18th Amendment, and in view of the provisions of the Volstead Act intended to make that amendment effective.”

In the *Tynen* case, the later enacted statute contained neither a saving clause nor a repealing clause.

**THE SAVING CLAUSE INDICATES INTENT TO REPEAL  
FIRST REGULATION.**

Section 13 of the Second Act provides (App. 38):

“All actions, regulations, rules, orders, and proclamations heretofore taken, promulgated, made or issued by the President of the United States or the Secretary of the Treasury, under the Act of March 9, 1935, or under Section 43

or Section 45 of Title III of the Act of May 12, 1933, are hereby approved, ratified, and confirmed."

A similar clause in the First Act, Section 1 (App. 12, Sec. 1), went still further by ratifying orders, etc., "thereafter" made. No attempt was made to do that in Section 13, *supra*. It is thus apparent, by the omission to go that far in Section 13 of the Second Act, that it was not intended by Congress that the Second Act do so. Congress only intended to signify its approval of the actions *theretofore* taken by the President under the First Act. That it was not intended by Congress to continue in force the pre-existing power and authority of the President is therefore quite clearly indicated by the language employed in the Saving Clause in the Second Act.

**IDLE LEGISLATION WOULD RESULT IF OTHER CONSTRUCTION APPLIED.**

If it were intended that the pre-existing Presidential authority still continue, it would not have been necessary to enact Section 3 of the Second Act in order to delegate to the Secretary of the Treasury the power to make regulations on the subject. The President acting under the First Act could have delegated to the Secretary of the Treasury, under the power expressly vested in him by said Act so to do, all legal power necessary to enable the Secretary of the Treasury to make the Second Regulation. The fact is that similar delegation of power upon related subjects had already been effected by Presidential

proclamations and executive orders made pursuant to the First Act. Some of these proclamations and executive orders appear in the appendix, pp. 8, 14, 16, 23, 24 and 25.

Each of these proclamations and orders was made prior to the enactment of the Second Act and each delegated to the Secretary of the Treasury the power and jurisdiction to make regulations. Consequently the Second Act was not required in order to give the Secretary of the Treasury the necessary power.

If Section 3 of the Second Act was not necessary to give this power to the Secretary of the Treasury, the question then is, Why did Congress enact Section 3? Congress could not have intended to enact unnecessary legislation. By construing Section 13 so as to continue in force the First Regulation and hence the power already delegated therein to the Secretary of the Treasury by the President would be giving to Section 13 a construction which would make Section 3 meaningless and useless. A construction of that kind is not countenanced.

*Bird v. U. S.*, 187 U.S. 118, 47 L. Ed. 100;

*Winter v. Burrage*, 103 U.S. 447, 456, 26 L. Ed. 405.

Section 3 must therefore mean exactly that which it so plainly and definitely states, that the Secretary of the Treasury *shall* make regulations without any restrictions whatsoever so far as the subject of gold coin is concerned excepting of course the requirement of Presidential approval.



**CONGRESSIONAL HEARING ON THE SECOND ACT ALSO SHOWS  
A CONGRESSIONAL INTENT TO REPEAL THE FIRST REGU-  
LATION.**

An examination of the records which were introduced at the hearing before the Committee on Banking and Currency, United States Senate, 73rd Congress (2nd Session) on the Second Act, S.2366 (App. 2), will disclose such intention.

The President's message (App. 3) and the Secretary of Treasury's statement to the committee (App. 5) clearly indicate not only that the Second Act originated with the President of the United States and the Secretary of the Treasury, but also that Section 13 was intended only as a ratification of actions taken prior to that time. The enactment of the bill without any change or modification strongly indicates not only that Congress was willing to cooperate with the President and the Secretary of the Treasury by doing their bidding but was also willing to adopt their intent as its own.

It appears from a comparison of all of the documents before the committee at said hearing that the President and the Secretary of the Treasury recognized that the language employed in the First Regulation (only collectors may acquire) hindered those persons who were not collectors from gratifying the desire to eventually become such. Such comparison also indicates that the President and the Secretary of the Treasury intended that this objection should be met and removed through the medium of the Second Regulation. The action taken by them in pro-



mulgating the Second Regulation when considered in the light of the language employed in executive orders previously made shows not only that there was no possible mistake about the language which was employed in the Second Regulation but it also shows that the President (by his written approval attached to the Second Regulation) and the Secretary of the Treasury (because he made said regulation) believed and intended that the Second Act was to actually transfer the power (to make all regulations) from the President to the Secretary of the Treasury. To construe the intent otherwise would be but to declare indirectly that the making of the Second Regulation was an idle act on the part of the Secretary of the Treasury.

**FAILURE TO PROPOSE AMENDMENT TO FIRST REGULATION  
TO EFFECT DESIRED OBJECT IS SIGNIFICANT.**

The repugnancy existing between the two Regulations could have been very easily avoided by merely amending the First Regulation so as to actually accomplish the purpose of the Second Regulation by either having the First Regulation provide merely that the Secretary of the Treasury may make regulations upon the subject or having it actually specify that gold coins of recognized and special value to collectors thereof may be acquired by any person without the necessity of obtaining a license therefor.

That this was not done is a strong circumstance which also points but to one conclusion, the conclusion that both the President and the Secretary of the Treasury intended that the First Act, at least

so far as it concerns gold coins, was being effectively repealed by Section 17 of the Second Act.

Thus the records of the Congressional hearing show an intent by Congress to repeal the gold coin portion of the First Regulation as well as the President's power to make regulations upon the subject.

Where, as here, such legislative intent is so patent upon the face of the documents which were before said Congressional committee, the *Yuginovich* case, *supra*, should unquestionably control the Court's construction of the later statute. In the instant case the gold coin provisions of the First Regulation should therefore be held to have been effectively repealed by Section 17 of the Second Act to such extent at least as concerns the subject matter alleged in the first count of the indictment.

We have thus shown that the Second Act should be held to have repealed the First Regulation (Executive Order 6260, as amended).

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#### POINT B.

##### **THE FIRST ACT IS UNCONSTITUTIONAL IN THAT IT DELEGATES TO THE PRESIDENT POWER TO LEGISLATE.**

The portion of the First Act which purported to grant the President the power to "regulate or prohibit, under such rules and regulations as he may prescribe, by means of license or otherwise, any transactions in foreign exchange, transfers of credit between or payments by banking institutions as defined by the President, and export, hoarding, melting or

earmarking of gold or silver coin or bullion or currency" (Sec. 5 (b) of Act of March 9, 1933. (App. 12)), is an unconstitutional delegation of legislative power to the President.

The Constitution vests all legislative powers in the Congress (Const., Art. I, Par. 1). This power may not be delegated to the executive branch of the Government (*Panama Ref. Co. v. Ryan*, 293 U.S. 388, 55 S. Ct. 241, 79 L. Ed. 446; *Schechter v. United States*, 295 U.S. 495, 79 L. Ed. 1570).

It is said in the *Schechter* case, and also in the *Panama Ref. Co.* case, that Congress may perform its functions in laying down policies and establishing standards while leaving to the Executive within these prescribed limits the making of subordinate rules and the determination of facts upon which the policy, as declared by the Congress, is to apply.

Accordingly, we must examine Section 5 (b) of the First Act to determine whether there is any clear statement of "policy" or any statement therein established for the regulation or prohibition of the *acquisition* of gold coin. No policy nor any standard is fixed in this Act. The language of the Act states, "The President may \* \* \* investigate, regulate or prohibit under such rules and regulations as he may prescribe. \* \* \*"

Under what circumstances or state of facts shall he regulate, and under what circumstances or state of facts shall he prohibit the *acquisition* of gold coin?

We seek in vain to learn from the Act under what declared policy or what standard fixed by the Con-

gress the President may regulate or prohibit such acquisition. No policy is declared by the Congress. No standard is fixed by the Act. The President may or may not act solely in his own discretion. In other words, the President alone may decide whether or not the *acquisition* or the hoarding of any gold coin shall or shall not be a crime and punishable by the penal provisions of the statute.

It was held in the *Panama Ref. Co.* case, that one of the necessary steps to be taken by the President before he could exercise the authority to enact the prohibition was a finding of fact by the President and that the Act must so provide in order to be constitutional. There is no such provision in Section 5 (b) of the first Act. The President is not required to investigate and determine the existence or non-existence of facts or conditions before exercising the authority granted him by the Act to declare the *acquisition* of gold coin a crime. There is no statement or clause in the First Act which defines under what circumstances or conditions the *acquisition* of gold coin shall be prohibited. Such prohibition of *acquisition* of gold coin rests solely in the untrammelled will of the President and without any legislative restraint thereon.

Under the authority of the *Panama Ref. Co.* case and the *Schechter* case, we respectfully submit that the Act fails to define any policy, to set up any standard, and vests in the President alone the sole discretion as to whether or not the *acquisition* of gold coin shall or shall not be prohibited and shall or shall not

be a criminal offense. The Act, we submit therefore, is unconstitutional and is a delegation of legislative power to the President which is not authorized by the Constitution of the United States.

It is respectfully submitted that the writ should issue.

Dated, San Francisco, California,  
October 11, 1940.

CHELLIS M. CARPENTER,  
*Attorney for Petitioner.*

**(Appendix Follows.)**

## Appendix

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The "Trading With the Enemy Act" of 1917, before amendment, provided, as far as pertinent, as follows:

"Sec. 5(a) That the President \* \* \* may make such rules and regulations, not inconsistent with law, as may be necessary and proper to carry out the provisions of this Act; and the President may exercise any powers or authority conferred by this Act through such officer or officers as he shall direct. \* \* \*"

"Sec. 5(b) That the President may investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange, export or ear-marking of gold or silver coin or bullion or currency, transfers of credit in any form (other than credits relating solely to transactions to be executed wholly within the United States), and transfers of evidences of indebtedness or of the ownership of property between the United States and any foreign country, whether enemy, ally of enemy or otherwise, or between residents of one or more foreign countries, by any person within the United States; and he may require any such person engaged in any such transaction to furnish, under oath, complete information relative thereto, including the production of any books of account, contracts, letters or other papers, in connection therewith in the custody or control of such person, either before or after such transaction is completed."

"Section 16. That whoever shall wilfully violate any of the provisions of this Act or of any

license, rule, or regulation issued thereunder, and whoever shall wilfully violate, neglect, or refuse to comply with any order of the President issued in compliance with the provisions of this Act shall, upon conviction, be fined not more than \$10,000, or, if a natural person, imprisoned for not more than ten years, or both; and the officer, director or agent of any corporation who knowingly participates in such violation shall be punished by a like fine, imprisonment, or both, and any property, funds, securities, papers or other articles or documents, or any vessel, together with its tackle, apparel, furniture, and equipment, concerned in such violation shall be forfeited to the United States."

The following contains that which we believe to be the pertinent portions of the Report of Hearings before the Committee on Banking and Currency, United States Senate, 73rd Congress, 2nd Session on S. 2366 (Jan. 19 to 23, 1934).

FRIDAY, JANUARY 19, 1934.

United States Senate,  
Committee on Banking and Currency,  
Washington, D. C.

The committee met, pursuant to call, at 2 p. m., in room No. 301 of the Senate Office Building, Senator Duncan U. Fletcher presiding.

Present: Senators Fletcher (chairman), Glass, Wagner, Barkley, Bulkley, Gore, Byrnes, Bankhead,

Adams, Goldsborough, Townsend, Walcott, Carey, Couzens, Steiwer, and Kean.

The Chairman. The committee will come to order, please. This meeting has been called for a hearing on S. 2366, which will be made a part of the record.

\* \* \* \* \*

The Chairman. I think it would be proper to insert in the record the Executive order by the President with reference to gold, which Executive order was issued last spring; and also another Executive order by the President; and a statement by the Secretary of the Treasury, the opinion rendered by the Attorney General, the statement made by Governor Black. These documents have been offered before the committee when in executive session, and they will be made a part of the record.

(The papers referred to are as follows):

[S. Doc. No. 114, 73d Cong., 2d sess.]

*To the Congress:*

\* \* \* \* \*

Certain lessons seems clear. For example, the free circulation of gold coins is unnecessary, leads to hoarding, and tends to a possible weakening of national financial structures in times of emergency. The practice of transferring gold from one individual to another or from the Government to an individual within a nation is not only unnecessary but is in every way undesirable. The transfer of gold in bulk is essential only for the payment of international trade balances.



Therefore it is a prudent step to vest in the government of a nation the title to and possession of all monetary gold within its boundaries and to keep that gold in the form of bullion rather than in coin.

Because the safe-keeping of this monetary basis rests with the Government, we have already called in the gold which was in the possession of private individuals or corporations. There remains, however, a very large weight in gold bullion and coins which is still in the possession or control of the Federal Reserve banks.

\* \* \* \* \*

Certain amendments of existing legislation relating to the purchase and sale of gold and to other monetary matters would add to the convenience of handling current problems in this field. The Secretary of the Treasury is prepared to submit information concerning such changes to the appropriate committees of the Congress.

\* \* \* \* \*

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,  
January 15, 1934.  
(Report, pp. 6-8.)

READ TO SENATE COMMITTEE ON BANKING AND CURRENCY BY THE HONORABLE SECRETARY OF THE TREASURY ON JANUARY 16, 1934.

MEMORANDUM.

(For guidance of the press but not to be quoted ---  
as a Treasury statement.)

The following were the chief developments today in the monetary situation:

1. \* \* \*

2. In compliance with the request contained in the President's message there was introduced in Congress today a bill which makes the necessary amendments to existing law and provides the machinery for carrying out the President's suggestion. The provisions of the bill may be summarized as follows:

\* \* \* \* \*

Clarifies the Government's power to regulate the acquisition, transporting, melting or treating, import, export, or earmarking of gold.

Provides forfeiture of gold withheld, acquired, transported, melted or treated, imported, exported, or earmarked in violation of this bill or regulations of the Secretary of the Treasury, and also a penalty equal to twice the value of the gold.

\* \* \* \* \*

Approves and confirms action taken by the President and the Secretary of the Treasury under the act of March 9, 1933, and sections 43 and 45 of the act of May 12, 1933.

3. \* \* \*

(Report, pp. 8-10.)

TREASURY DEPARTMENT'S RELEASE TO MORNING  
PAPERS, JANUARY 18, 1934.

The Secretary of the Treasury issued instructions tonight (Jan. 17), authorizing the Treasurer of the United States, the United States Mints and Assay Offices, and the Federal Reserve banks to continue, until further notice, to receive gold coin and gold certificates and to pay therefor in other currency at their face value. They were also authorized to receive gold bullion and to pay for it at the statutory rate of \$20.67 per ounce.

The instructions issued tonight are made subject to the rights reserved in the Secretary's order of January 15, setting midnight of January 17 as the final date on which gold coin, gold certificates, and gold bullion might be delivered in compliance with the Secretary's order of December 28, 1933.

Inquiries have been received by the Treasury Department from business men who desire to know whether they may continue to accept gold coin and certificates in payment for merchandise and services. The instructions which were sent out tonight will provide a way by which they may dispose of receipts of gold coin and gold certificates and receive payment for them.

INSTRUCTIONS SENT BY THE SECRETARY OF THE TREASURY ON JANUARY 17, 1934, TO THE TREASURER OF THE UNITED STATES, THE UNITED STATES MINTS AND ASSAY OFFICES, AND THE FISCAL AGENTS OF THE UNITED STATES, CONCERNING WRONGFULLY WITHHELD GOLD COIN, GOLD BULLION, AND GOLD CERTIFICATES DELIVERED AFTER JANUARY 17, 1934.

The order of the Secretary of the Treasury dated January 15, 1934, supplementing the order of December 28, 1933, requiring the delivery of gold coin, gold bullion, and gold certificates to the Treasurer of the United States provides, in part, as follows:

"\* \* \* I, HENRY MORGENTHAU, JR., Secretary of the Treasury, do hereby fix midnight of Wednesday, January 17, 1934, as the expiration of the period within which any gold coin, gold bullion, or gold certificates may be paid and delivered to the Treasurer of the United States in compliance with the requirements contained in such order of December 28, 1933, as amended.

\* \* \* \* \*

Subject to the rights reserved in said order of January 15, 1934, supplementing the order of December 28, 1933, requiring the delivery of gold coin, gold bullion, and gold certificates to the Treasurer of the United States, and without prejudice to the right to alter or amend these instructions from time to time by notice to the Treasurer of the United States, the United States Mints and Assay Offices, and the Federal Reserve banks, I do hereby prescribe that in the event that any gold coin, gold bullion, or gold

certificates held in noncompliance with said order of December 28, 1933, as amended, and said order of January 15, 1934, are offered after January 17, 1934, to the Secretary of the Treasury, the Treasurer of the United States, any United States Mint or Assay Office or to any fiscal agent of the United States, the Secretary of the Treasury, the Treasurer of the United States, any United States Mint or Assay Office, and the fiscal agents of the United States shall pay for such gold coin and gold certificates the dollar face amount thereof, and for gold bullion \$20.67 an ounce. Member banks of the Federal Reserve System may receive such gold coin, gold bullion, and gold certificates for account of the Treasurer of the United States and forthwith forward the same to the Secretary of the Treasury, the Treasurer of the United States, any United States Mint or Assay Office or any fiscal agent of the United States, whichever is nearest.

H. MORGENTHAU, JR.,

*Secretary of the Treasury.*

(Report, pp. 17-18.)

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A PROCLAMATION BY THE PRESIDENT OF THE UNITED STATES OF AMERICA. (No. 2039.) (48 Stat. L. 1.)

[BANK HOLIDAY, MAR. 6-9, 1933, INCLUSIVE.]

Whereas there have been heavy and unwarranted withdrawals of gold and currency from our banking institutions for the purpose of hoarding; and

Whereas continuous and increasingly extensive speculative activity abroad in foreign exchange has

resulted in severe drains on the Nation's stocks of gold; and

Whereas these conditions have created a national emergency; and

Whereas it is in the best interests of all bank depositors that a period of respite be provided with a view to preventing further hoarding of coin, bullion or currency, or speculation in foreign exchange and permitting the application of appropriate measures to protect the interests of our people; and

Whereas it is provided in section 5 (b) of the act of October 6, 1917 (40 Stat. L. 411), as amended "That the President may investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange and the export, hoarding, melting, or earmarkings of gold or silver coin or bullion or currency \* \* \*"; and

Whereas it is provided in section 16 of the said act "that whoever shall willfully violate any of the provisions of this act or of any license, rule, or regulation issued thereunder, and whoever shall willfully violate, neglect, or refuse to comply with any order of the President issued in compliance with the provisions of this act, shall, upon conviction, be fined not more than \$10,000, or, if a natural person, imprisoned for not more than 10 years, or both; \* \* \*";

Now, therefore, I, Franklin D. Roosevelt, President of the United States of America, in view of such national emergency and by virtue of the authority

vested in me by said Act and in order to prevent the export, hoarding, or earmarking of gold or silver coin or bullion or currency, do hereby proclaim, order, direct, and declare that from Monday, the 6th day of March, to Thursday, the 9th day of March, 1933, both dates inclusive, there shall be maintained and observed by all banking institutions and all branches thereof located in the United States of America, including the territories and insular possessions, a bank holiday, and that during said period all banking transactions shall be suspended. During such holiday, excepting as hereinafter provided, no such banking institution or branch shall pay out, export, earmark, or permit the withdrawal or transfer in any manner or by any device whatsoever, of any gold or silver coin or bullion or currency or take any other action which might facilitate the hoarding thereof; nor shall any such banking institution or branch pay out deposits, make loans or discounts, deal in foreign exchange, transfer credits from the United States to any place abroad, or transact any other banking business whatsoever.

During such holiday, the Secretary of the Treasury, with the approval of the President and under such regulations as he may prescribe, is authorized and empowered (a) to permit any or all of such banking institutions to perform any or all of the usual banking functions; (b) to direct, require, or permit the issuance of clearing house certificates or other evidences of claims against assets of banking institutions, and (c) to authorize and direct the creation

in such banking institutions of special trust accounts for the receipt of new deposits which shall be subject to withdrawal on demand without any restriction or limitation and shall be kept separately in cash or on deposit in Federal Reserve Banks or invested in obligations of the United States.

As used in this order the term "banking institutions" shall include all Federal Reserve banks, national banking associations, banks, trust companies, savings banks, building and loan associations, credit unions, or other corporations, partnerships, associations or persons, engaged in the business of receiving deposits, making loans, discounting business paper, or transacting any other form of banking business.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done in the city of Washington this 6th day of March, 1 a. m., in the year of our Lord 1933, and of the independence of the United States, the one hundred and fifty-seventh.

[SEAL]

FRANKLIN D. ROOSEVELT.

By the president:

CORDELL HULL,

*Secretary of State.*

(Report, pp. 18-19.)



[PUBLIC—No. 1—73RD CONGRESS]

[H.R. 1491]

AN ACT To provide relief in the existing national emergency in banking, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Congress hereby declares that a serious emergency exists and that it is imperatively necessary speedily to put into effect remedies of uniform national application.

#### TITLE I

SECTION 1. The actions, regulations, rules, licenses, orders and proclamations heretofore or hereafter taken, promulgated, made, or issued by the President of the United States or the Secretary of the Treasury since March 4, 1933, pursuant to the authority conferred by subdivision (b) of section 5 of the Act of October 6, 1917, as amended, are hereby approved and confirmed.

SEC. 2. Subdivision (b) of section 5 of the act of October 6, 1917 (40 Stat. L. 411), as amended, is hereby amended to read as follows:

“(b) During time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange, transfers of credit

between or payments by banking institutions as defined by the President, and export, hoarding, melting, or earmarking of gold or silver coin or bullion or currency, by any person within the United States or any place subject to the jurisdiction thereof; and the President may require any person engaged in any transaction referred to in this subdivision to furnish under oath, complete information relative thereto, including the production of any books of account, contracts, letters or other papers, in connection therewith in the custody or control of such person, either before or after such transaction is completed. Whoever willfully violates any of the provisions of this subdivision or of any license, order, rule or regulation issued thereunder, shall, upon conviction, be fined not more than \$10,000, or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both. As used in this subdivision the term 'person' means an individual, partnership, association, or corporation."

SEC. 3. \* \* \*

SEC. 4. \* \* \*

## TITLE II

SEC. 201. This title may be cited as the "Bank Conservation Act."

\* \* \* \* \*

## TITLE III

\* \* \* \* \*

TITLE IV

SEC. 401. The sixth paragraph of section 18 of the Federal Reserve Act is amended to read as follows:

\* \* \* \* \*

TITLE V

SEC. 501. \* \* \*

SEC. 502. The right to alter, amend, or repeal this Act is hereby expressly reserved. If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby.

Approved March 9, 1933, 8:30 p. m.

(Report, pp. 19-24.)

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A PROCLAMATION BY THE PRESIDENT OF THE  
UNITED STATES OF AMERICA.

No. (2040)

CONTINUING IN FORCE THE BANK HOLIDAY PROCLAMATION  
OF MARCH 6, 1933.

\* \* \* \* \*

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EXECUTIVE ORDER No. 6073.

REGULATIONS CONCERNING THE OPERATION OF BANKS.

By virtue of the authority vested in me by section 5 (b) of the act of October 6, 1917 (40 Stat. L. 411),

as amended by the act of March 9, 1933, and by section 4 of the said act of March 9, 1933, and by virtue of all other authority vested in me, I hereby issue the following Executive order:

The Secretary of the Treasury is authorized and empowered under such regulations as he may prescribe to permit any member bank of the Federal Reserve System and any other banking institution organized under the laws of the United States to perform any or all of their usual banking functions, except as otherwise prohibited.

\* \* \* \* \*

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,

*March 10, 1933.*

(Report, p. 25.)

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TREASURY DEPARTMENT,  
OFFICE OF THE SECRETARY,  
*March 13, 1933.*

EMERGENCY BANKING REGULATION No. 25:

Under the authority of the President's proclamation of March 6 and March 9, 1933, declaring and continuing a bank holiday, the following regulation is prescribed:

"Pending the determination by the Treasury Department of a suitable procedure for licensing the delivery of gold for use in trade, profession or art, Federal Reserve banks are hereby authorized to deliver

upon request therefor gold in amounts deemed by such bank to be reasonably required for legitimate and customary uses in trade, profession or art, provided such request is accompanied by affidavit of the person requesting such gold stating the amount of unmanufactured gold on hand and the facts making it necessary to obtain such gold for the purpose of maintaining employment.

“All banks licensed to open for usual and normal functions are permitted to carry out any transaction necessary to complete the delivery of any gold authorized by any Federal Reserve bank to be delivered in accordance with such request.”

(Report, p. 27.)

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EXECUTIVE ORDER No. 6102.

FORBIDDING THE HOARDING OF GOLD COIN, GOLD BULLION,  
AND GOLD CERTIFICATES.

By virtue of the authority vested in me by section 5 (b) of the act of October 6, 1917, as amended by section 2 of the act of March 9, 1933, entitled “An act to provide relief in the existing national emergency in banking, and for other purposes”, in which amendatory act Congress declared that a serious emergency exists, I, Franklin D. Roosevelt, President of the United States of America, do declare that said national emergency still continues to exist, and pursuant to said section do hereby prohibit the hoarding of gold coin, gold bullion, and gold certificates within

the continental United States by individuals, partnerships, associations, and corporations, and do hereby prescribe the following regulations for carrying out the purposes of this order:

SECTION 1. For the purposes of this regulation, the term "hoarding" means the withdrawal and withholding of gold coin, gold bullion, or gold certificates from the recognized and customary channels of trade. The term "person" means any individual, partnership, association, or corporation.

SEC. 2. All persons are hereby required to deliver, on or before May 1, 1933, to a Federal Reserve bank or a branch or agency thereof, or to any member bank of the Federal Reserve System, all gold coin, gold bullion, and gold certificates now owned by them or coming into their ownership on or before April 28, 1933, except the following:

(a) Such amount of gold as may be required for legitimate and customary use in industry, profession, or art within a reasonable time, including gold prior to refining and stocks of gold in reasonable amounts for the usual trade requirements of owners mining and refining such gold.

(b) Gold coin and gold certificates in an amount not exceeding in the aggregate \$100 belonging to any one person; and *gold coins having a recognized special value to collectors of rare and unusual coins.*

(c) \* \* \*

(d) \* \* \*

SEC. 3. Until otherwise ordered, any person becoming the owner of any gold coin, gold bullion, or gold certificates after April 28, 1933, shall, within 3 days after receipt thereof, deliver the same in the manner prescribed in section 2; unless such gold coin, gold bullion, or gold certificates are held for any of the purposes specified in paragraphs (a), (b), or (c) of section 2; or \* \* \*

SEC. 4. \* \* \*

SEC. 5. \* \* \*

SEC. 6. \* \* \*

SEC. 7. \* \* \*

SEC. 8. The *Secretary of the Treasury* is hereby authorized and *empowered to issue* such further *regulations* as he may deem necessary to carry out the purposes of this order and to issue licenses thereunder, through such officers or agencies as he may designate, including licenses permitting the Federal Reserve banks and member banks of the Federal Reserve System, in return for an equivalent amount of other coin, currency, or credit, to deliver, earmark, or hold in trust gold coin and bullion to or for persons showing the need for the same for any of the purposes specified in paragraphs (a), (c), and (d) of section 2 of these regulations.

SEC. 9. Whoever willfully violates any provision of this Executive order or of these regulations, or of any rule, regulation, or license issued thereunder may be fined not more than \$10,000, or, if a natural per-

son, may be imprisoned for not more than 10 years, or both; and any officer, director, or agent of any corporation who knowingly participates in any such violation may be punished by a like fine, imprisonment, or both.

This order and these regulations may be modified or revoked at any time.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,

*April 5, 1933.*

(Italics ours.)

(Report, pp. 27-28.)

#### EXECUTIVE ORDER No. 6260.

RELATING TO THE HOARDING, EXPORT, AND EARMARKING  
OF GOLD COIN, BULLION, OR CURRENCY, AND TO TRANS-  
ACTIONS IN FOREIGN EXCHANGE.

By virtue of the authority vested in me by section 5 (b) of the act of October 6, 1917, as amended by section 2 of the act of March 9, 1933, entitled "An act to provide relief in the existing national emergency in banking and for other purposes", I, Franklin D. Roosevelt, President of the United States of America, do declare that a period of national emergency exists, and by virtue of said authority and of all other authority vested in me, do hereby prescribe the following provisions for the investigation and regulation of the hoarding, earmarking, and export of gold coin, gold bullion, and gold certificates by any



person within the United States or any place subject to the jurisdiction thereof; and for the investigation and regulation of transactions in foreign exchange and transfers of credit and the export or withdrawal of currency from the United States or any place subject to the jurisdiction thereby by any person within the United States or any place subject to the jurisdiction thereof.

SEC. 2. *Definitions.*—As used in this order the term “person” means an individual, partnership, association, or corporation; and the term “the United States” means the United States and any place subject to the jurisdiction thereof.

SEC. 3. *Returns.*—Within 15 days from the date of this order every person in possession of and every person owning gold coin, gold bullion, or gold certificates shall make under oath and file as hereinafter provided a return to the Secretary of the Treasury containing true and complete information relative thereto, including the name and address of the person making the return; the kind and amount of such coin, bullion, or certificates held and the location thereof; if held for another, the capacity in which held and the person for whom held, together with the post-office address of such person; and the nature of the transaction requiring the holding of such coin, bullion, or certificates and a statement explaining why such transaction cannot be carried out by the use of currency other than gold certificates; provided that no returns are required to be filed with respect to—

(a) Gold coin, gold bullion, and gold certificates in an amount not exceeding in the aggregate \$100 belonging to any one person;

(b) *Gold coin having a recognized special value to collectors* of rare and unusual coin;

(c) Gold coin, gold bullion, and gold certificates acquired or held under a license heretofore granted by or under authority of the Secretary of the Treasury; and

(d) Gold coin, gold bullion, and gold certificates owned by Federal Reserve banks.

Such return required to be made by an individual shall be filed with the collector of internal revenue for the collection district in which such individual resides, or, if such individual has no legal residence in the United States, then with the collector of internal revenue at Baltimore, Md. Such return required to be made by a partnership, association, or corporation shall be filed with the collector of internal revenue of the collection district in which is located the principal place of business or principal office or agency of such partnership, association, or corporation, or, if it has no principal place of business or principal office or agency in the United States, then with the collector of internal revenue at Baltimore, Md. Such return required to be made by an individual residing in Alaska shall be filed with the collector of internal revenue at Seattle, Wash. Such return required to be made by a partnership, association, or corporation having its principal place of

business or principal office or agency in Alaska shall be filed with the collector of internal revenue at Seattle, Wash.

The Secretary of the Treasury may grant a reasonable extension of time for filing a return, under such rules and regulations as he shall prescribe. No such extension shall be for more than 45 days from the date of this Executive order. An extension granted hereunder shall be deemed a license to hold for a period ending 15 days after the expiration of the extension.

The returns required to be made and filed under this section shall constitute public records; but they shall be open to public inspection only upon order of the President and under rules and regulations prescribed by the Secretary of the Treasury.

A return made and filed in accordance with this section by the owner of the gold coin, gold bullion, and gold certificates described therein, or his duly authorized agent, shall be deemed an application for the issuance under section 5 hereof of a license to hold such coin, bullion, and certificates.

**SEC. 4.** *Acquisition of gold coin and gold bullion.*—No person other than a Federal Reserve bank shall after the date of this order acquire in the United States any gold coin, gold bullion, or gold certificates except under license therefor issued pursuant to this Executive order, provided that member banks of the Federal Reserve System may accept delivery of such coin, bullion, and certificates for surrender

promptly to a Federal Reserve bank, and provided further that persons requiring gold for use in the industry, profession, or art in which they are regularly engaged may replenish their stocks of gold up to an aggregate amount of \$100, by acquisitions of gold bullion held under licenses issued under section 5 (b), without necessity of obtaining a license for such acquisitions.

The Secretary of the Treasury, subject to such further regulations as he may prescribe, shall issue licenses authorizing the acquisition of—

(a) Gold coin or gold bullion which the Secretary is satisfied is required for a necessary and lawful transaction for which currency other than gold certificates cannot be used, by an applicant who establishes that since March 9, 1933, he has surrendered an equal amount of gold coin, gold bullion, or gold certificates to a banking institution in the continental United States or to the Treasurer of the United States:

(b) Gold coin or gold bullion which the Secretary is satisfied is required by an applicant who holds a license to export such an amount of gold coin or gold bullion issued under subdivisions (c) or (d) of section 6 hereof; and

(c) Gold bullion which the Secretary, or such agency as he may designate, is satisfied is required for legitimate and customary use in industry, profession, or art by an applicant regularly engaged in

such industry, profession, or art, or in the business of furnishing gold therefor.

Licenses issued pursuant to this section shall authorize the holder to acquire gold coin and gold bullion only from the sources specified by the Secretary of the Treasury in regulations issued hereunder.

SEC. 5. *Holding of gold coin, gold bullion, and gold certificates.*—After 30 days from the date of this order no person shall hold in his possession or retain any interest, legal or equitable, in any gold coin, gold bullion, or gold certificates situated in the United States and owned by any person subject to the jurisdiction of the United States, except under license therefor issued pursuant to this Executive order: *Provided, however,* That licenses shall not be required in order to hold in possession or retain an interest in gold coin, gold bullion, or gold certificates with respect to which a return need not be filed under section 3 hereof.

The Secretary of the Treasury, subject to such further regulations as he may prescribe, shall issue licenses authorizing the holding of—

(a) Gold coin, gold bullion, and gold certificates, which the Secretary is satisfied are required by the person owning the same for necessary and lawful transactions for which currency, other than gold certificates, cannot be used;

(b) Gold bullion which the Secretary, or such agency as he may designate, is satisfied is required for legitimate and customary use in industry, profession,

or art by a person regularly engaged in such industry, profession, or art or in the business of furnishing gold therefor;

(c) Gold coin and gold bullion earmarked or held in trust since before April 20, 1933, for a recognized foreign government or foreign central bank or the Bank for International Settlements; and

(d) Gold coin and gold bullion imported for re-export or held pending action upon application for export licenses.

SEC. 6. *Earmarking and export of gold coin and gold bullion.*—After the date of this order no person shall earmark or export any gold coin, gold bullion, or gold certificates from the United States, except under license therefor issued by the Secretary of the Treasury pursuant to the provisions of this order.

The Secretary of the Treasury, in his discretion and subject to such regulations as he may prescribe, may issue licenses authorizing—

(a) The export of gold coin or gold bullion earmarked or held in trust since before April 20, 1933, for a recognized foreign government, foreign central bank, or the Bank for International Settlements;

(b) The export of gold, (i) imported for re-export, (ii) refined from gold-bearing materials imported by the applicant under an agreement to export gold, or (iii) in bullion containing not more than 5 ounces of gold per ton;

(c) The export of gold coin or gold bullion to the extent actually required for the fulfillment of a contract entered into by the applicant prior to April 20, 1933; but not in excess of the amount of the gold coin, gold bullion, and gold certificates surrendered by the applicant on or after March 9, 1933, to a banking institution in the continental United States or to the Treasurer of the United States; and

(d) The earmarking for foreign account and/or export of gold coin or gold bullion, with the approval of the President, for transactions which the Secretary of the Treasury may deem necessary to promote the public interest.

SEC. 7. *United States possessions—Shipments thereto.*— \* \* \*

SEC. 10. Whoever wilfully violates any provision of this Executive order or of any license, order, rule, or regulation issued or prescribed hereunder shall, upon conviction, be fined not more than \$10,000, or, if a natural person, may be imprisoned for not more than 10 years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both.

SEC. 11. The Executive orders of April 5, 1933, forbidding the hoarding of gold coin, gold bullion, and gold certificates, and April 20, 1933, relating to foreign exchange and the earmarking and export of gold coin or bullion or currency, respectively, are hereby revoked. \* \* \* This Executive order and

any regulations or licenses issued hereunder may be modified or revoked at any time.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,

*August 28, 1933.*

(Report, pp. 34-37.) (Italics ours.)

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ORDER OF THE SECRETARY OF THE TREASURY REQUIRING  
THE DELIVERY OF GOLD COIN, GOLD BULLION, AND  
GOLD CERTIFICATES TO THE TREASURER OF THE  
UNITED STATES.<sup>1</sup>

Whereas \* \* \*

Now, therefore, I, Henry Morgenthau, Jr., Acting Secretary of the Treasury, do hereby require every person subject to the jurisdiction of the United States forthwith to pay and deliver to the Treasurer of the United States all gold coin, gold bullion, and gold certificates situated in the United States, owned by such person, except as follows:

A. \* \* \*.

B. Gold coin having a recognized special value to collectors of rare and unusual coin. \* \* \*<sup>2</sup>

C. Unmelted scrap gold and gold sweepings in an amount not exceeding in the aggregate \$100, belonging to any one person; and gold which has been put through a process of fabrication for a specific and customary industrial, professional, or ornamental use;

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<sup>1</sup>Amended by order of the Secretary of the Treasury, Jan. 11, 1934; see table of exhibits; and supplemented by order of the Secretary of the Treasury, Jan. 15, 1934; see table of exhibits.

<sup>2</sup>Amended by order of the Secretary of the Treasury, Jan. 11, 1934; see table of exhibits.



D. \* \* \*

E. \* \* \*

SEC. 2. *Delivery.* \* \* \*

SEC. 4. *Definitions.*—As used in this order, the term “person” means any individual, partnership, association, or corporation; the term “United States” means the United States and any place subject to the jurisdiction thereof; the term “continental United States” means the States of the United States, the District of Columbia, and the Territory of Alaska; the term “gold coin” means any coin containing gold, including foreign gold coin; and the term “gold bullion” means any gold which has been put through a process of smelting or refining that is in such form that its value depends upon the gold content and not upon the form, but does not include gold coin or metals containing less than five troy ounces of fine gold per short ton.

SEC. 5. Any individual, partnership, association, or corporation failing to comply with any requirement hereof or of any rules or regulations issued by the Secretary of the Treasury hereunder shall be subject to the penalty provided in section 11 (n) of the Federal Reserve Act, as amended.

This order may be modified or revoked at any time.

H. MORGENTHAU, JR.,

*Acting Secretary of the Treasury.*

Approved.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,

December 28, 1933.

(Report, pp. 45-46.)

## EXECUTIVE ORDER No. 6556.

AMENDMENT OF EXECUTIVE ORDER No. 6260  
OF AUGUST 28, 1933.

The first paragraph of section 4 of Executive Order No. 6260 of August 28, 1933, relating to the hoarding, export, and earmarking of gold coin, bullion, or currency, and to transactions in foreign exchange is hereby amended to read as follows:

SEC. 4. *Acquisition of gold coin and gold bullion.*—No person other than a Federal Reserve bank shall, after the date of this order, acquire in the United States any gold coin, gold bullion, or gold certificates except under license therefor issued pursuant to this Executive order, provided that member banks of the Federal Reserve System may accept delivery of such coin, bullion, and certificates for surrender promptly to a Federal Reserve bank, and provided further that persons requiring gold for use in the industry, profession, or art in which they are regularly engaged may replenish their stocks of gold up to an aggregate amount of \$100, by acquisitions of gold bullion held under licenses issued under section 5 (b), without necessity of obtaining a license for such acquisitions, and provided further that collectors of rare and unusual coin may acquire from one another and hold without necessity of obtaining a license therefor gold coin having a recognized special value to collectors of rare and unusual coin \* \* \*.

Section 6 of the aforesaid order is hereby amended by adding thereto the following subparagraph:

(e) Through any agency that he may designate, the export of gold coin having a recognized special value to collectors of rare and unusual coin. \* \* \*

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,

*January 12, 1934.*

(Report, pp. 47-48.)

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TREASURY DEPARTMENT,

OFFICE OF THE SECRETARY,

*January 31, 1934.*

## PROVISIONAL REGULATIONS

ISSUED UNDER THE

### GOLD RESERVE ACT OF 1934

#### ARTICLE I. GENERAL PROVISIONS

SECTION 1. *Authority for regulations.*—These regulations, deemed necessary and proper by the Secretary of the Treasury to carry out the purposes of the Gold Reserve Act of 1934, approved January 30, 1934, are issued by the Secretary of the Treasury, with the approval of the President, under authority of said Act.

SEC. 2. *Scope.*—Articles II, III, IV, and V of these regulations refer particularly to section 3 of the Gold Reserve Act of 1934; and articles VI and VII refer particularly to sections 8 and 9, respectively, thereof.

The provisions of these regulations may be revoked or modified at any time and any license outstanding at the time of such revocation or modification shall

be modified thereby to the extent provided in such revocation or modification.

SEC. 3. *Titles and subtitles.*—\* \* \*

SEC. 4. *Definitions.*—As used in these regulations, the term—

“Act” means the Gold Reserve Act of 1934, approved January 30, 1934.

\* \* \* \* \*

“Person” means any individual, partnership, association, or corporation, including the Federal Reserve Board, Federal Reserve banks, and Federal Reserve Agents.

\* \* \* \* \*

“Gold coin” means any coin containing gold as a major element, including gold coin of a foreign country.

\* \* \* \* \*

“Scrap gold” means gold sweepings and fabricated gold, the value of which depends primarily upon its gold content and not upon its form, which is no longer held for the use for which it was processed or manufactured.

\* \* \* \* \*

SEC. 11. *Penalties.*—Any gold withheld, acquired, transported, melted or treated, imported, exported, or earmarked or held in custody in violation of the Act, or of any regulations issued thereunder, including these regulations, or of any licenses issued pursuant thereto or hereto, shall be forfeited to the United States and may be seized and condemned by like proceedings as those provided by law for the forfeiture,

seizure, and condemnation of property imported into the United States contrary to law; and, in addition, any person failing to comply with the provisions of the Act or of any such regulations or licenses shall be subject to a penalty equal to twice the value of the gold in respect of which such failure occurred.

ARTICLE II. CONDITIONS UNDER WHICH GOLD MAY  
BE ACQUIRED AND HELD, TRANSPORTED, MELTED OR  
TREATED, IMPORTED, EXPORTED, OR EARMARKED OR  
HELD IN CUSTODY FOR FOREIGN OR DOMESTIC AC-  
COUNT.

SEC. 12. Gold in any form may be acquired, transported, melted or treated, imported, exported, or earmarked or held in custody for foreign or domestic account (except on behalf of the United States), only to the extent permitted by, and subject to the conditions prescribed in, these regulations or licenses issued pursuant to these regulations.

SEC. 13. *Transportation of gold.*—Gold may be transported by carriers for persons who are licensed to hold and transport such gold or who are permitted by these regulations to hold and transport gold without a license.

SEC. 14. *Gold situated outside of the United States.*—Gold in any form situated outside of the United States may be acquired, transported, melted or treated, or earmarked or held in custody for foreign or domestic account without the necessity of holding a license.

SEC. 15. *Gold situated in the possessions of the United States.*—\* \* \*

\* \* \* \* \*

SEC. 16. *Fabricated gold.*—(1) Fabricated gold may be acquired, transported within the United States, imported, or held in custody for domestic account without the necessity of holding a license therefor: \* \* \*

\* \* \* \* \*

SEC. 17. *Metals containing gold.*—\* \* \*

SEC. 18. *Unmelted scrap gold.*—Unmelted scrap gold may be held and transported within the United States in amounts containing not more than 5 troy ounces of fine gold without the necessity of holding a license.

SEC. 19. *Gold in its natural state.*—Gold in its natural state (i.e., gold recovered from natural sources which has not been melted, smelted, or refined or otherwise treated by heating or by a chemical or electrical process) may be acquired, transported within the United States, imported, or held in custody for domestic account without the necessity of holding a license therefor. Such native gold may be melted or treated or exported only to the extent permitted by, and subject to the conditions prescribed in, or pursuant to, article III.

SEC. 20. *Rare coin.*—Gold coin of recognized special value to collectors of rare and unusual coin \* \* \* may be acquired and held, transported within the United States, imported, or held in custody for do-

mestic account without the necessity of holding a license therefor. \* \* \*

ARTICLE III. GOLD FOR INDUSTRIAL, PROFESSIONAL,  
AND ARTISTIC USE.

\* \* \* \* \*

ARTICLE IV. GOLD FOR THE PURPOSE OF SETTLING  
INTERNATIONAL BALANCES, AND FOR OTHER PUR-  
POSES. \* \* \*

\* \* \* \* \*

ARTICLE V. GOLD FOR OTHER PURPOSES NOT INCON-  
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ACT OF 1934.

\* \* \* \* \*

SEC. 33. *Gold imported for reexport.*—\* \* \*

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ARTICLE VI. PURCHASE OF GOLD BY MINTS.

\* \* \* \* \*

ARTICLE VII. SALE OF GOLD BY MINTS.

\* \* \* \* \*

ARTICLE VIII. TRANSITORY PROVISIONS.

\* \* \* \* \*

HENRY MORGENTHAU, JR.,  
*Secretary of the Treasury.*

Approved:

FRANKLIN D. ROOSEVELT,  
THE WHITE HOUSE.

Articles I, II, III, IV, V, and VIII approved  
January 30, 1934.

Articles VI and VII approved January 31, 1934.

## GOLD RESERVE ACT OF 1934.

AN ACT To protect the currency system of the United States, to provide for the better use of the monetary gold stock of the United States, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the short title of this Act shall be the "Gold Reserve Act of 1934."

SEC. 2. (a) \* \* \*

(b) Section 16 of the Federal Reserve Act, as amended, is further amended in the following respects: \* \* \*

SEC. 3. The Secretary of the Treasury shall, by regulations issued hereunder, with the approval of the President, prescribe the conditions under which gold may be acquired and held, transported, melted or treated, imported, exported, or earmarked; (a) for industrial, professional, and artistic use; (b) by the Federal Reserve banks for the purpose of settling international balances; and (c) for such other purposes as in his judgment are not inconsistent with the purposes of this Act. Gold in any form may be acquired, transported, melted or treated, imported, exported, or earmarked or held in custody for foreign or domestic account (except on behalf of the United States) only to the extent permitted by, and subject to the conditions prescribed in, or pursuant to, such regulations. Such



regulations may exempt from the provisions of this section, in whole or in part, gold situated in the Philippine Islands or other places beyond the limits of the continental United States.

SEC. 4. Any gold withheld, acquired, transported, melted or treated, imported, exported, or earmarked or held in custody, in violation of this Act or of any regulations issued hereunder, or licenses issued pursuant thereto, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law; and in addition any person failing to comply with the provisions of this Act or of any such regulations or licenses, shall be subject to a penalty equal to twice the value of the gold in respect of which such failure occurred.

SEC. 5. \* \* \*

SEC. 6. \* \* \*

SEC. 7. \* \* \*

SEC. 8. \* \* \*

SEC. 9. \* \* \*

SEC. 10. (a) For the purpose of stabilizing the exchange value of the dollar, the Secretary of the Treasury, with the approval of the President, directly or through such agencies as he may designate, is authorized, for the account of the fund established in this section, to deal in gold and foreign exchange and such other instruments

of credit and securities as he may deem necessary to carry out the purpose of this section. An annual audit of such funds shall be made and a report thereof submitted to the President.

(b) To enable the Secretary of the Treasury to carry out the provisions of this section there is hereby appropriated, out of the receipts which are directed to be covered into the Treasury under section 7 hereof, the sum of \$2,000,000,000, which sum when available shall be deposited with the Treasurer of the United States in a stabilization fund (hereinafter called the "fund") under the exclusive control of the Secretary of the Treasury, with the approval of the President, whose decisions shall be final and not be subject to review by any other officer of the United States. The fund shall be available for expenditure, under the direction of the Secretary of the Treasury and in his discretion, for any purpose in connection with carrying out the provisions of this section, including the investment and reinvestment in direct obligations of the United States of any portions of the fund which the Secretary of the Treasury, with the approval of the President, may from time to time determine are not currently required for stabilizing the exchange value of the dollar. The proceeds of all sales and investments and all earnings and interest accruing under the operations of this section shall be paid into the fund and shall be available for the purposes of the fund.

(c) All the powers conferred by this section shall expire two years after the date of enactment of this Act, unless the President shall sooner declare the existing emergency ended and the operation of the stabilization fund terminated; but the President may extend such period for not more than one additional year after such date by proclamation recognizing the continuance of such emergency.

SEC. 11. The Secretary of the Treasury is hereby authorized to issue, with the approval of the President, such rules and regulations as the Secretary may deem necessary or proper to carry out the purposes of this Act.

SEC. 12. \* \* \*

SEC. 13. All actions, regulations, rules, orders, and proclamations heretofore taken, promulgated, made or issued by the President of the United States or the Secretary of the Treasury, under the Act of March 9, 1933, or under section 43 or section 45 of title III of the Act of May 12, 1933, are hereby approved, ratified, and confirmed.

SEC. 14. \* \* \*

SEC. 15. \* \* \*

SEC. 16. The right to alter, amend, or repeal this Act is hereby expressly reserved. If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act, and the application of such

provision to other persons or circumstances, shall not be affected thereby.

SEC. 17. All Acts and parts of Acts inconsistent with any of the provisions of this Act are hereby repealed.

Approved, January 30, 1934.

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THE CHAIRMAN. The committee will now proceed with the hearing on the bill S. 2366. Governor Roy A. Young is present; and if it is agreeable to him, we will hear him at this time.

(Report, pp. 84-91.)

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# **In the Supreme Court of the United States**

OCTOBER TERM, 1940

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No. 503

GUS FARBER, PETITIONER

v.

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE NINTH  
CIRCUIT*

---

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## **OPINION BELOW**

The opinion of the Circuit Court of Appeals (R. 210-222) is reported in 114 F. (2d) 5.

## **JURISDICTION**

The judgment of the Circuit Court of Appeals was entered July 27, 1940 (R. 223), and a petition for rehearing was denied September 16, 1940 (R. 224). The petition for a writ of certiorari was filed October 14, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the

Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

#### QUESTIONS PRESENTED

1. Whether the portions relating to gold coin of Section 5 (b) of the Trading With the Enemy Act, as amended, and Executive Order No. 6260, as amended, which were issued thereunder, were superseded and abrogated by the Gold Reserve Act of 1934 and the Provisional Regulations promulgated thereunder.

2. Whether Section 5 (b) of the Trading With the Enemy Act, as amended, insofar as it relates to gold coin, is unconstitutional because of delegation of legislative power to the President.

#### STATUTES, ORDERS, AND REGULATIONS INVOLVED

The pertinent portions of these are copied in the Appendix, *infra*, pp. 16-19.

#### STATEMENT

On May 4, 1939, an indictment in two counts was returned against the petitioner and others in the District Court for the Northern District of California (R. 1-4). The first count charged that the defendants wilfully, unlawfully, and knowingly acquired thirteen genuine twenty-dollar gold coins of the United States without a license issued in accordance with Executive Order No. 6260, as amended (Appendix, *infra*, p. 17), in violation of



Section 5 (b) of the Trading With the Enemy Act, as amended (Appendix, *infra*, p. 16). The second count charged them with a conspiracy unlawfully to acquire gold coin. The petitioner was convicted under the first count and acquitted under the second (R. 7), and was sentenced to imprisonment for a period of six months and to pay a fine of \$1,000 (R. 8). On appeal, the Circuit Court of Appeals for the Ninth Circuit unanimously affirmed the judgment of conviction (R. 210-223) and denied rehearing (R. 224).

#### ARGUMENT

##### I

Petitioner does not here question that there was sufficient evidence to warrant the jury in finding that he wilfully acquired genuine gold coins of the United States without having a license, in violation of Section 5 (b) of the Trading With the Enemy Act, as amended, and Executive Order No. 6260, as amended. His contention is that he should not have been prosecuted under Section 5 (b) and the Executive Order because, so far as gold coin is concerned, they were superseded prior to the commission of the offense charged in the indictment by the later Gold Reserve Act of 1934 and the Provisional Regulations issued thereunder by the Secretary of the Treasury.

There was no express repeal or abrogation of the earlier statute and Executive Order, but the petitioner contends that by Section 3 of the Gold Re-

serve Act the power to formulate regulations on the subject of gold coin was removed by Congress from the jurisdiction of the President and conferred upon the Secretary of the Treasury, and that the Provisional Regulations of the Secretary of the Treasury were intended to supplant the prior Executive Order. In support of this the petitioner points to the similarity of language employed in the two statutes. He also relies upon the so-called savings provisions of Section 13 of the Gold Reserve Act and upon certain documents which were before the Senate Committee which recommended passage of the Gold Reserve Act. He further relies upon an alleged inconsistency between the Executive Order and the Provisional Regulations with reference to the classes of persons exempted from the licensing requirements.

We submit that the Circuit Court of Appeals correctly held that the Gold Reserve Act of 1934 and the Provisional Regulations promulgated thereunder did not supersede Section 5 (b) of the Trading With the Enemy Act, as amended, and Executive Order No. 6260, and hence that the petitioner was properly prosecuted and convicted under their provisions.

By Section 5 (b) of the Trading With the Enemy Act, as amended (Appendix, *infra*, p. 16), Congress gave the President the power during time of war or other period of national emergency to regulate or prohibit the export, hoarding, melting, or earmarking of gold coin, and provided criminal

punishment for anyone who wilfully violated the regulations issued thereunder. Section 3 of the Gold Reserve Act (Appendix, *infra*, p. 18) gave the Secretary of the Treasury the power, by regulations approved by the President, to prescribe the conditions under which gold could be acquired and held, transported, melted or treated, imported, exported, or earmarked. However, no criminal sanction was provided for the violation of such regulations. Where gold was acquired contrary to the Secretary's Regulations, or a license issued thereunder, provision was made by Section 4 (Appendix, *infra*, p. 18) for the forfeiture of the gold and for the imposition of a penalty equal to twice the value of the gold involved.

While the statutory provisions in question are overlapping, they are not mutually exclusive. It clearly was not the intention of Congress in enacting Sections 3 and 4 of the Gold Reserve Act of 1934 to repeal by implication Section 5 (b) of the Trading With the Enemy Act, as amended. On the contrary, Congress in enacting Sections 3 and 4 obviously intended to confer upon the Secretary of the Treasury powers to act with respect to gold in addition to, and not to the exclusion of, the powers over gold theretofore granted to the President. The powers of the President under Section 5 (b) of the Trading With the Enemy Act, as amended, are to be exercised only "during time of war or during any other period of national emergency." No such emergency is necessary to bring into play

the powers vested in the Secretary of the Treasury by Section 3 of the Gold Reserve Act. The conditions under which the President and Secretary of the Treasury may act are independent and the sanctions are in one instance civil and in the other criminal.

The Act of March 9, 1933 (48 Stat. 1), amended Section 5 (b) of the Trading With the Enemy Act, as amended.<sup>1</sup> Yet Section 3 of the 1933 Act, amended Section 11 of the Federal Reserve Act by adding a new subsection (n) which provided in part:

Whenever in the judgment of the Secretary of the Treasury such action is necessary to protect the currency system of the United States, the Secretary of the Treasury, in his discretion, may require any or all individuals, partnerships, associations, and corporations to pay and deliver to the Treasurer of the United States any or all gold coin, gold bullion, and gold certificates owned by such individuals, partnerships, associations, and corporations. \* \* \*

Thus in the same Act Congress conferred upon the President and the Secretary of the Treasury separate powers to deal with the hoarding of gold. The conditions under which the President and Secre-

---

<sup>1</sup> Section 2 of that Act so amended Section 5 (b) of the Trading With the Enemy Act, as amended, as to authorize the President "during time of war or during any other period of national emergency" to "investigate, regulate, or prohibit \* \* \* hoarding \* \* \* of gold \* \* \* coin or bullion or currency."

tary were to act, while overlapping, were independent. Acting under the separate powers so conferred, the President and the Secretary each took valid action to deal with the hoarding of gold.<sup>2</sup> Sections 3 and 4 of the Gold Reserve Act occupy the same general field as does Section 3 of the Act of March 9, 1933. By their enactment, therefore, Congress did not intend to deprive the President of the powers over gold vested in him by Section 5 (b) of the Trading With the Enemy Act, which was amended simultaneously with the enactment of Section 3 of the Act of March 9, 1933.

Again, Public Resolution No. 69, 76th Congress, approved May 7, 1940, further amended Section 5 (b) and yet retained the provisions relating to gold unchanged. This is conclusive of the fact that

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<sup>2</sup> Executive Order No. 6102 of April 5, 1933 (Appendix to Petitioner's Brief, pp. 16-19); Executive Order No. 6260 of August 28, 1933, as amended (Appendix to Petitioner's Brief, pp. 19-27, 29); Order of the Secretary of the Treasury of December 28, 1933, as amended and supplemented (Appendix to Petitioner's Brief, pp. 27-28). See *Norman v. B. & O. R. Co.*, 294 U. S. 240; *Nortz v. United States*, 294 U. S. 317; *Perry v. United States*, 294 U. S. 330. In *British American Tobacco Co. Ltd. v. Federal Reserve Bank of New York* (S. D. N. Y., opinion unreported); affirmed (C. C. A. 2d), 104 F. (2d) 652, 105 F. (2d) 935, certiorari denied, 308 U. S. 600, it was specifically determined that the President possesses the power under Section 5 (b) of the Trading With the Enemy Act, as amended, to regulate the hoarding of gold, notwithstanding the fact that the Secretary of the Treasury has authority to deal with the same subject under the amendment to the Federal Reserve Act made by Section 3 of the Act of March 9, 1933.

Congress by enacting Sections 3 and 4 of the Gold Reserve Act did not intend to repeal that part of Section 5 (b) of the Trading With the Enemy Act, as amended, relating to gold. Indeed, in this Joint Resolution Congress expressly approved and confirmed Executive Order No. 8389, dated April 10, 1940, and regulations and general rulings issued thereunder. Executive Order No. 8389 prohibited, except as authorized in regulations or licenses issued by the Secretary of the Treasury, the following transactions, among others, if involving property in which Norway or Denmark or any national thereof has had any interest at any time on or since April 8, 1940:

The export or withdrawal from the United States, or the earmarking of gold or silver coin or bullion or currency by any person within the United States.<sup>3</sup>

Congress has thus expressed in an unequivocal manner its intention that the powers with respect to gold conferred upon the President by Section 5 (b) of the Trading With the Enemy Act, as amended, shall continue in full force and effect.

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<sup>3</sup>Amendments to Executive Order No. 8389 made since the adoption of Public Resolution No. 69 have so extended the above-quoted restrictions on gold transactions, among others, as to make them applicable with respect to the Netherlands, Belgium, Luxembourg, France, Latvia, Estonia, Lithuania, and Rumania, and nationals thereof. Executive Order No. 8405, dated May 10, 1940; Executive Order No. 8446, dated June 17, 1940; Executive Order No. 8484, dated July 15, 1940; Executive Order No. 8565, dated October 10, 1940.

A further reason indicating that there was no implied repeal are the well settled rules that Congress may impose both a criminal and a civil sanction in respect to the same act or omission (*Helvering v. Mitchell*, 303 U. S. 391, 399-400), and that a statute imposing a civil sanction will not be construed to repeal by implication a statute imposing a criminal sanction for the same act or omission, or *vice versa*, in the absence of a clear legislative intent. *Stockwell v. United States*, 13 Wall. 531, 552; cf. *United States v. Claflin*, 97 U. S. 546, 552-553. See also *Harvey v. State*, 5 Ind. App. 422; *Reg. v. Wigg*, 2 Salk. 460; *Gray v. Cookson*, 16 East. 13; *Rex v. Robinson*, 2 Burr. 799. Petitioner makes no showing of any such intent with respect to the statutes here involved.<sup>4</sup>

On the contrary, when Congress by Section 13 of the Gold Reserve Act of 1934 (Appendix, *infra*, p. 19) approved, ratified and confirmed all regulations, orders, etc., promulgated and issued pursuant to the amendment in 1933 of the Trading With the Enemy Act, it presumably recognized the continued existence and validity of that Act and of the orders issued thereunder. Cf. *United States v. 71.41 Ounces Gold Filled Scrap*, 94 F. (2d) 17, 18

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<sup>4</sup> *United States v. Yuginovich*, 256 U. S. 450, and *United States v. Tynen*, 11 Wall. 88, cited by the petitioner, are clearly not in point since in those cases both of the statutes involved were criminal statutes and the later one covered the same subject matter and made provision for or permitted a smaller criminal punishment.

(C. C. A. 2d); *Ruffino v. United States*, 114 F. (2d) 696 (C. C. A. 9th).

There is nothing in the documents before the Senate Committee which recommended passage of the Gold Reserve Act, referred to by the petitioner (Appendix to Petitioner's Brief, pp. 2-5), that discloses any intention to repeal any provision of Section 5 (b) of the Trading With the Enemy Act, as amended, or to abrogate any provision of the Executive Order issued thereunder. Indeed, a portion of the President's Message not quoted by the petitioner (Senate Document No. 114, p. 1, 73d Cong., 2d Sess.) refers to the proposed legislation as "additional legislation," and it is stated in that part of the message quoted by the petitioner (Appendix to Petitioner's Brief, p. 4) that "Certain amendments of existing legislation relating to the purchase and sale of gold and to other monetary matters would add to the convenience of handling current problems in this field."

Petitioner discusses at considerable length an alleged differentiation in the treatment by the Executive Order under the Trading With the Enemy Act, as amended, and the later Provisional Regulations under the Gold Reserve Act of those who acquire rare and unusual coin, apparently in support of the view that the Provisional Regulations were intended to supplant the Executive Order.<sup>5</sup> The

<sup>5</sup> Section 4 of Executive Order No. 6260, as amended (Appendix, *infra*, p. 17), provided "that *collectors* of rare and unusual coin may acquire *from one another* and hold with-



Order and Regulations are clearly intended to stand together. It is apparent that a holding of gold in accordance with the conditions of the Gold Reserve Act and the Regulations issued thereunder would not violate the prior gold orders, including Executive Order No. 6260 of August 28, 1933; the Act and Regulations would operate in such a case to permit the holding of gold which, without such permission, might be in violation of the earlier orders.<sup>6</sup> In any event, whether or not there was an implied repeal of Executive Order No. 6260, so far as it covers transactions involving coins of recognized value to collectors, this cannot aid petitioner. He states that "The record, beyond any question of doubt, conclusively establishes that the gold coin involved in the instant case had a value, beyond their gold content, to collectors of rare and unusual coins" (Br. 16). But there was testimony

out necessity of obtaining a license therefor gold coin having a recognized special value to collectors of rare and unusual coin." Section 20 of the Provisional Regulations under the Gold Reserve Act of 1934 (Appendix, *infra*, p. 19), does not restrict the unlicensed transactions in such coins to those who are collectors.

<sup>6</sup> In this connection it is to be observed that the Treasury Department has always regarded Executive Order No. 6260 as remaining in full force and effect as indicated (with certain exceptions immaterial here), and that the continued administrative practice of that Department has been governed accordingly. This view has been expressed in several communications from the Treasury Department to the Department of Justice in connection with cases in which prosecutions for violations of Executive Order No. 6260 of August 28, 1933, were instituted.

that the coin was not of this character (R. 74), and, as was pointed out in the opinion of the Circuit Court of Appeals (R. 216), the jury was instructed that they must acquit the petitioner if they found "from the evidence that the gold coins in question had a recognized special value to collectors of rare and unusual coin, and were acquired because of this recognized special value to collectors of rare and unusual coin, and not solely for the purpose of acquiring the gold bullion contained in said coins" (R. 145-146). It is evident therefore that the jury in returning a verdict of guilty found of necessity that the coins were not gold coins having a recognized special value to collectors of rare and unusual coin. Since the petitioner does not attack this finding he stands in the position of having acquired ordinary gold coins without having obtained a license and consequently was not exempted under either the Executive Order or the Provisional Regulations.

## II

The petitioner further contends that Section 5 (b) of the Trading With the Enemy Act, as amended, is unconstitutional because it delegated legislative power to the President. He asserts that the Act fixed no standard or policy for the regulation or prohibition of the acquisition of gold coin. It does not appear that this contention was made in the trial court, and it is not mentioned in the grounds of appeal (R. 10-13) or in the assign-

ments of error (R. 173-201) in the Circuit Court of Appeals, in the briefs before that court, or in the court's opinion (R. 210-222). Moreover, we submit that the contention is without merit.

Section 5 (b) (Appendix, *infra*, p. 16) provides that during time of war or during any other period of national emergency declared by the President, the President may investigate, regulate, or prohibit under such rules and regulations as he may prescribe by means of licenses, or otherwise, any transactions in certain fields including gold hoarding. The first section of Executive Order No. 6260 issued thereunder (Appendix, *infra*, p. 17) states that under the authority vested in him by Section 5 (b) the President declares a period of national emergency to exist, and the following sections prescribe certain provisions for the investigation and regulation of the hoarding, etc., of gold coin, gold bullion, and gold certificates. In Section 5 (b) Congress has indicated its policy that during wartime or periods of national emergency gold hoarding shall be investigated, regulated, or prohibited by the President, and by the Executive Order the President merely discharged the administrative function vested in him by the statute of carrying out the congressional policy of subjecting transactions in gold to the controls required to meet the emergency as it arose. Plainly, the need for prompt action would preclude Congress from formulating detailed standards after the emergency arose, and justified its grant of broad discretion to the President. Cf.

*United States v. Grimaud*, 220 U. S. 506, 517; *Panama Refining Co. v. Ryan*, 293 U. S. 388, 428-429. The statute, not the President, declares the policy, creates the offense, and fixes the penalty. The only cases directly passing upon the question hold that Section 5 (b) does not unduly delegate legislative power to the President. *Campbell v. Chase Nat. Bank of the City of New York*, 5 F. Supp. 156, 173 (S. D. N. Y.), and *United States v. Driscoll*, 9 F. Supp. 454, 456 (D. Mass.). Such a view seems also to have been implicit in *Perry v. United States*, 294 U. S. 330, 355-356.

But, whatever the objections petitioners might have raised to the breadth of the powers given the President by Section 5 (b) of the Trading with the Enemy Act, any defects would have been cured by Section 13 of the Gold Reserve Act of 1934 (Appendix, *infra*, p. 19) which in terms declares that "All actions, regulations, rules, orders, and proclamations heretofore" taken, made or issued by the President under the Act of March 9, 1933 [which amended Section 5 (b) of the Trading with the Enemy Act] "are hereby approved, ratified, and confirmed." Executive Order 6260 was promulgated prior to the enactment of Section 13 and cannot, therefore, now be attacked as the exercise of a legislative power unlawfully delegated (*Swayne & Hoyt, Ltd. v. United States*, 300 U. S. 297, 301-302, and cases cited).

**CONCLUSION**

The case was correctly decided by the Circuit Court of Appeals and there is involved no conflict of decisions. We therefore respectfully submit that the petition for writ of certiorari should be denied.

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## APPENDIX

### STATUTES, ORDERS AND REGULATIONS

Section 5 (b) of the Trading With the Enemy Act of October 6, 1917, c. 106, 40 Stat. 411, 415, as amended March 9, 1933, c. 1, Section 2, 48 Stat. 1 (U. S. C., Title 12, Sec. 95a) :

During time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange, transfers of credit between or payments by banking institutions as defined by the President, and export, hoarding, melting, or earmarking of gold or silver coin or bullion or currency, \* \* \*. Whoever willfully violates any of the provisions of this subdivision or of any license, order, rule, or regulation issued thereunder, shall, upon conviction, be fined not more than \$10,000, or, if a natural person, may be imprisoned for not more than ten years, or both; \* \* \*.

The pertinent portions of Executive Order No. 6260, issued August 28, 1933, as amended by Executive Order No. 6556, issued January 12, 1934 (copied under U. S. C., Title 12, Sec. 95), which Executive Orders were issued pursuant to Section

5 (b) of the Trading With the Enemy Act, as amended:

By virtue of the authority vested in me by section 5 (b) of the act of October 6, 1917, as amended by section 2 of the act of March 9, 1933, entitled "An act to provide relief in the existing national emergency in banking and for other purposes", I, Franklin D. Roosevelt, President of the United States of America, do declare that a period of national emergency exists, and by virtue of said authority and of all other authority vested in me, do hereby prescribe the following provisions for the investigation and regulation of the hoarding, earmarking, and export of gold coin, gold bullion, and gold certificates by any person within the United States or any place subject to the jurisdiction thereof; \* \* \*

\* \* \* \* \*

SEC. 4. ACQUISITION OF GOLD COIN AND GOLD BULLION.—No person other than a Federal Reserve bank shall after the date of this order acquire in the United States any gold coin, gold bullion, or gold certificates except under license therefor issued pursuant to this Executive order: \* \* \* provided further that collectors of rare and unusual coin may acquire from one another and hold without necessity of obtaining a license therefor gold coin having a recognized special value to collectors of rare and unusual coin \* \* \*.

Gold Reserve Act of 1934, c. 6, 48 Stat. 337:

SEC. 2. (a) Upon the approval of this Act all right, title, and interest, and every claim of the Federal Reserve Board, of every Federal Reserve bank, and of every Federal Reserve agent, in and to any and all



gold coin and gold bullion shall pass to and are hereby vested in the United States; \* \* \* (U. S. C., Title 31, Sec. 441).

\* \* \* \* \*  
SEC. 3. The Secretary of the Treasury shall, by regulations issued hereunder, with the approval of the President, prescribe the conditions under which gold may be acquired and held, transported, melted or treated, imported, exported, or earmarked: (a) for industrial, professional, and artistic use; (b) by the Federal Reserve banks for the purpose of settling international balances; and, (c) for such other purposes as in his judgment are not inconsistent with the purposes of this Act. Gold in any form may be acquired, transported, melted or treated, imported, exported, or earmarked or held in custody for foreign or domestic account (except on behalf of the United States) only to the extent permitted by, and subject to the conditions prescribed in, or pursuant to, such regulations \* \* \*. (U. S. C., Title 31, Sec. 442.)

SEC. 4. Any gold withheld, acquired, transported, melted or treated, imported, exported, or earmarked or held in custody, in violation of this Act or of any regulations issued hereunder, or licenses issued pursuant thereto, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law; and in addition any person failing to comply with the provisions of this Act or of any such regulations or licenses, shall be subject to a penalty equal to twice the value of the gold in



respect of which such failure occurred.  
(U. S. C., Title 31, Sec. 443.)

SEC. 5. No gold shall hereafter be coined, and no gold coin shall hereafter be paid out or delivered by the United States: \* \* \*. All gold coin of the United States shall be withdrawn from circulation, \* \* \*. (U. S. C., Title 31, Sec. 315b.)

\* \* \* \* \*

SEC. 13. All actions, regulations, rules, orders, and proclamations heretofore taken, promulgated, made or issued by the President of the United States or the Secretary of the Treasury, under the Act of March 9, 1933, or under section 43 or section 45 of title III of the Act of May 12, 1933, are hereby approved, ratified, and confirmed. (U. S. C., Title 31, Sec. 824.)

Section 20 of the Provisional Regulations issued by the Secretary of the Treasury on January 31, 1934, with the approval of the President, pursuant to Section 3 of the Gold Reserve Act of 1934:

SEC. 20. RARE COIN.—Gold coin of recognized special value to collectors of rare and unusual coin \* \* \* may be acquired and held, transported within the United States, imported or held in custody for domestic account without the necessity of holding a license therefor \* \* \*.